

ORIGINAL

THE HONORABLE MARSHA PECHMAN

CV 99-01695 #00000217

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 BY WESTERN DISTRICT OF WASHINGTON DEPUTY

UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

AMAZON COM, INC ,

Plaintiff,

v

BARNESANDNOBLE COM, INC , and  
 BARNESANDNOBLE COM LLC,

Defendants

NO C99-1695P

AMAZON COM'S REPLY IN SUPPORT  
 OF ITS MOTION FOR PROTECTIVE  
 ORDER LIMITING 30(b)(6)  
 DEPOSITIONS

Despite Bn com's numerous opportunities to obtain the information that it seeks, Bn com continues to claim that Amazon com is attempting to "thwart" discovery Bn com has already deposed the most knowledgeable witnesses on the topics for which it seeks discovery, and its additional requests are merely an attempt impose an unnecessary burden and expense upon Amazon com without providing any additional information useful to resolving the remaining issues in this action

ARGUMENT

Bn com has already deposed the four inventors of the '411 patent Bn com would like this Court to believe that Amazon com's Rule 30(b)(6) witness would provide different

REPLY IN SUPPORT OF MOTION FOR  
 PROTECTIVE ORDER LIMITING 30(b)(6)  
 DEPOSITIONS - 1

[24976-0219/SA013190 050]

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1 testimony than that of the inventors as to the date of conception and secondary considerations  
 2 of nonobviousness. This possibility is more than remote, since Amazon com has designated  
 3 Peri Hartman, one of the deposed inventors, as its 30(b)(6) witness. Moreover, Bn com's  
 4 assertion in its Opposition that Amazon com refused to offer Mr Hartman on an additional  
 5 date is simply not true. Amazon com offered the deposition of Mr Hartman on consecutive  
 6 days at Bn com's convenience. See Supplemental Declaration of William D Fisher in Support  
 7 of Amazon com's Motion for Protective Order Limiting 30(b)(6) Depositions ("Supp Fisher  
 8 Decl"), Exh A. Bn com rejected that offer. See Supp Fisher Decl, Exh B. Because  
 9 Bn com has already deposed the most knowledgeable witnesses, and its additional requests  
 10 would impose an unnecessary burden and expense upon Amazon com without providing any  
 11 additional information useful to settling the remaining issues in this action, Amazon com's  
 12 motion for a protective order should be granted.

13  
 14 Bn com argues that Amazon com's Motion was untimely. The express language of  
 15 Rule 26, however, does not set limits within which a motion for protective order must be  
 16 made. See Fed R Civ P 26. Amazon com's Motion was filed on October 30, the same date  
 17 as the scheduled 30(b)(6) deposition on secondary considerations. In the interests of  
 18 efficiency and conserving judicial resources, Amazon com chose to file one motion as to both  
 19 of the scheduled depositions, attempting in good faith to resolve these disputes with Bn com  
 20 prior to filing its Motion.

21  
 22 The cases Bn com cites to support its arguments as to the timeliness of the motion are  
 23 easily distinguishable. In Henry v Gill Indus, Inc, 983 F 2d 943, 947 (9th Cir 1993), the  
 24 court found that the opposing party had been "irreparably prejudiced" because the person  
 25 most likely to assist with a defense had died. Also, Henry had "twice forced cancellation of  
 26 his deposition by notifying Gill at the last minute that he would not appear." Id. Contrary to  
 27 Henry, where the person whose testimony was sought had died, Bn com has already deposed  
 28 Mr Hartman for a full day. Also, Amazon com did not notify Bn com "at the last minute,"  
 29 but almost three weeks before the first scheduled 30(b)(6) deposition. See Supp Fisher Decl,

Exh A Neither of the other cases cited by Bn com is on point The court in Brittain v Stroh Brewery Co., 136 F R D 408, 414 (M D N C 1991) found "good cause to excuse the defendant's otherwise untimely request for a protective order covering written discovery because defendant sought in good faith to negotiate a consent protective order "

Amazon com's attempts to resolve these discovery quibbles help conserve judicial resources

Were the Court, in every case, to insist on a motion for protective order at the same time a response is made to written discovery, the Court could be embroiled in a large number of discovery disputes that the parties could resolve among themselves

Id at 414, n 4 Similarly, the court in In re Air Crash Disaster, 130 F R D 627, 630 (E D Mich 1989) found that it was dilatory to wait for the opposing party to make a motion to compel prior to seeking a protective order Even if the North Carolina and Michigan district court cases cited by Bn com were binding authority on this Court, which they are not, Amazon com has shown "good cause" to excuse the alleged untimeliness See Brittain, 136 F R D at 413 ("a failure to request a protective order prior to the time set for producing the discovery may be excused for good cause"), In re Air Crash Disaster, 130 F R D at 630

Correspondence between the parties evidences that Bn com was aware that Amazon com would not produce a witness for the 30(b)(6) depositions and was in the process of seeking a protective order See Supp Fisher Decl , Exh C Almost a week prior to the deposition of Mr Hartman as an "individual," Amazon com notified Bn com that it would produce Mr Hartman as a 30(b)(6) witness See id., Exh D Amazon com also stated that it would produce Mr Hartman only on consecutive days as an individual and 30(b)(6) witness See id , Exh A Bn com asked Mr Hartman its 30(b)(6) questions during the initial deposition See Declaration of William D Fisher in Support of Amazon com's Motion for Protective Order dated October 30, 2001, Exh D Amazon com has proposed that Mr Hartman's corrected deposition testimony be available as 30(b)(6) deposition testimony

1 See Supp Fisher Decl , Exh E Bn com should not be allowed to end run the Federal Rules'  
2  
3 discovery limits by deposing Mr Hartman again on the same topics  
4

5 The information sought by Bn com is unreasonably cumulative because Bn com has  
6 already deposed and received answers from the most knowledgeable witnesses on its  
7 scheduled topics Regarding the date of invention, Jeffrey P Bezos has already told Bn com  
8 his recollection of the date of conception – falling between July 1994 and November 1996  
9

10 See Supp Fisher Decl , Exh F Bn com's argument that Amazon com's "attempt to  
11 reschedule the 30(b)(6) deposition on conception to [a date] before Bezos testified was clearly  
12 calculated to prevent discovery" is flawed in at least two respects First, it does not matter  
13 when Mr Hartman would have testified to Amazon com's "prior to May 1997" date, since the  
14 range Mr Bezos testified about occurred prior to May 1997 The testimony is consistent It  
15 is irrelevant whether Mr Hartman testified before or after Mr Bezos' deposition Second,  
16 prior to Mr Hartman's deposition as an "individual," Amazon com notified Bn com that it  
17 would produce Mr Hartman on consecutive days as an individual and 30(b)(6) witness See  
18 Supp Fisher Decl , Exh A Rather than rescheduling the date of the 30(b)(6) to before  
19 Mr Bezos' deposition, Amazon com agreed to have the deposition of Mr Hartman on  
20 consecutive days at a "mutually agreeable two day period " Id Amazon com did not propose  
21 a date prior to Mr Bezos' deposition and expressed its amenability to having the deposition  
22 after Mr Bezos' deposition Id  
23  
24

25 Bn com is simply trying to convolute the issues by incorporating into its arguments  
26 Bn com's Motion to Compel Testimony from Bezos and Spiegel, as well as its Opposition to  
27 Amazon com's Motion for Protective Order to Prevent Discovery from John Doerr The facts  
28 of this Motion, however, are clear Bn com has asked all four inventors of the '411 patent, the  
29 most knowledgeable witnesses on the issue, about the date of conception Displeased with  
30 the answers it has received, Bn com is attempting to harass and annoy Amazon com, with the  
31 desired outcome of obtaining nothing more than cumulative testimony For all of these  
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REPLY IN SUPPORT OF MOTION FOR  
PROTECTIVE ORDER LIMITING 30(b)(6)  
DEPOSITIONS - 4

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1 reasons, Amazon com's Motion for Protective Order limiting 30(b)(6) depositions should be  
2 granted  
3

4       Regarding secondary considerations of nonobviousness, Bn com states in its  
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6 Opposition that it seeks information about the relationship between commercial embodiments  
7 of the 1-Click® technology and the '411 patent. An additional deposition seeking this  
8 information would not be probative because Bn com already has received all of Amazon com's  
9 information on this issue. Both Mr. Bezos and Mr. Hartman answered Bn com's questions.  
10 Moreover, Amazon com has already provided Geoffrey Mulligan's expert report which details  
11 the commercial embodiments of the 1-Click® technology. See Supp. Fisher Decl., Exh. G. In  
12 addition, Amazon com has provided statistics on the value of orders taken using 1-Click®  
13 technology. See *id.*, Exh. H. Another deposition on these issues would be unreasonably  
14 duplicative.  
15

16       The 30(b)(6) deposition concerning design and development is annoying, oppressive  
17 and duplicative. Bn com wishes to depose Peri Hartman again on the same topics as in the  
18 initial deposition. Bn com knew during the initial deposition that Mr. Hartman was designated  
19 as Amazon com's 30(b)(6) witness and asked the same questions it will necessarily ask  
20 Mr. Hartman as a 30(b)(6) witness. Mr. Hartman's answers will not depend on whether he  
21 testifies as a 30(b)(6) or individual witness. Moreover, Bn com has already deposed the most  
22 knowledgeable witnesses on the remaining topics, the four inventors on Topic 1 (conception  
23 and reduction to practice) and Mr. Bezos on Topic 6 (statements made to Mr. Bezos). Topic  
24 5 ("other difficulties") is vague and overbroad.  
25

26       The 30(b)(6) questions that Bn com asked Mr. Hartman are not irrelevant.  
27 Amazon com has proposed that Mr. Hartman's corrected deposition testimony be available as  
28 30(b)(6) deposition testimony. See Supp. Fisher Decl., Exh. E. Unlike Blankenship v. Hearst  
29 Corp., 519 F.2d 418 (9th Cir. 1975), where the plaintiffs were seeking information from a  
30 person whom they had not yet deposed, Bn com has already deposed the most knowledgeable  
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1 witnesses on the topics requested Another deposition involving the same questions and the  
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3 same witness would be burdensome and duplicative

4 The 30(b)(6) deposition concerning secondary considerations is an improper attempt  
5  
6 to obtain Amazon com's legal contentions Although Bn com brands its requests as mere  
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8 "factual" inquiries, the wording of the requests reveals that Bn com is really seeking  
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10 Amazon com's legal contentions By asking for "facts or circumstances that either support or  
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12 detract from the obviousness or nonobviousness," Bn com is asking Amazon com to divulge  
13  
14 what *Amazon.com considers* to bear on the nonobviousness of its patent Bn com cannot  
15  
16 request Amazon com's legal contentions by renaming what Bn com seeks <sup>1</sup>

17 Simply because Bn com is apparently dissatisfied with Amazon com's responses to its  
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19 interrogatories, Bn com should not be permitted to use a 30(b)(6) deposition to discover  
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21 Amazon com's legal contentions Bn com could have made a motion to compel responses to  
22  
23 its interrogatories if Bn com was displeased Amazon com should not be bound to the  
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25 testimony of a "non-lawyer deponent" who has "great knowledge about the products in issue  
26  
27 here, but [may] be quite ill-equipped to reason reliably about the legal implications of the  
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29 relationship between those products or their components, and the various claims of the patent  
30  
31 in suit or of other patents or prior art " McCormick-Morgan, Inc. v. Teledyne Industries,  
32  
33 Inc., 134 F R D 275, 286, rev'd on other grounds, 765 F Supp 611, (N D Cal 1991)  
34  
35 Moreover, the court in Exxon Research & Eng Co. v United States, 44 Fed Cl 597, 601-  
36  
37 603 (1999), another patent infringement case, held that the use of contention interrogatories  
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39 was more appropriate than a deposition to seek legal contentions In light of these patent  
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41 infringement cases, this court should not permit Bn com to seek Amazon com's legal  
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43 contentions through a 30(b)(6) deposition

44 Amazon com should not incur monetary or non-monetary sanctions See Fed R Civ  
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46 P 37 Amazon com has not abused the discovery process or engaged in misrepresentation, its  
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<sup>1</sup> As for "[a]ny attempts by third parties to copy the invention," Amazon com has already disclosed all of the facts within its knowledge pertaining to this issue

1 motion for protective order was substantially justified, and an award of expenses would be  
2 unjust All of Bn com's requests for sanctions, therefore, should be denied  
3

4 DATED this 15<sup>th</sup> day of November 2001  
5

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10  
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12

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REPLY IN SUPPORT OF MOTION FOR  
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DEPOSITIONS - 7

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